

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10TH FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

February 6, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1274-D
ON BEHALF OF ELEVEN MINERS,	:	PIKE CD 94-16
Complainants	:	
v.	:	Pontiki No. 2 Mine
	:	Mine ID 15-09571
PONTIKI COAL CORPORATION,	:	
Respondent	:	

**SUMMARY DECISION**

Before: Judge Melick

This proceeding is now before me based upon the motion to dismiss filed by Respondent Pontiki Coal Corporation (Pontiki) on October 7, 1994. However, based upon subsequent stipulations reached by the parties incorporating documents not in dispute, I find that there is a basis for disposition in the form of the instant summary decision.<sup>1</sup> The undisputed record shows that complainant Charles H. Dixon filed a complaint of discrimination pursuant to section 105(c)(2) of the Federal Mine Safety and

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<sup>1</sup> Under Commission rule 67, 29 C.F.R. section 2700.67, "A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law."

Health Act of 1977, 30 U.S.C. section 801 et. seq., the "Act" on April 26, 1994 alleging the following discriminatory actions:

"Pontiki Coal Corporation, through and by management personnel, advised miners that they could not choose a representative of miners who was a representative of the United Mine Workers of America. The miners were further advised that if they chose a UMWA representative that Pontiki would be forced to spend thousands of dollars to defend their position and that only employees of Pontiki will be recognized as a representative of miners.

Management for Pontiki on or about March 11, 1994 further implied that the miners' jobs would be less secure as a result of the company having to spend thousands of dollars to defend their position and that if the company was not forced to spend this money on lawyers that it would mean more money for them.

Management for Pontiki on April 15, 1994 properly received by certified mail pursuant to 30 C.F.C. [sic] part 40 a certificate of representation of which they have failed to properly recognize."

In a letter to Mr. Dixon dated September 15, 1994 the

Secretary advised Mr. Dixon in relevant part as follows:

"Your complaint of discrimination, under section 105(c) of the Federal Mine Safety and Health Act, has been investigated and the results carefully considered.

Based on the results of this investigation, the Mine Safety and Health Administration (MSHA) has determined that, in its opinion, a violation of section 105(c) of the Act has occurred and that you have been discriminated against. MSHA, through the Office of the Solicitor, has prepared and filed a complaint on your behalf, requesting that Federal Mine Safety and Health Review Commission order relief which would remedy the discrimination."

Thereafter, apparently pursuant to section 105(c)(2) of the Act, the Secretary thereafter on September 6, 1994 filed a complaint of discrimination with this Commission alleging in part as follows:

"5. The following non-employees of Pontiki Coal Corporation have been appointed as duly authorized representatives of miners for the Pontiki No. 2 mine all within the meaning of section 105(c) of the Act [30 U.S.D. 815(c)]: Charles Dixon,

Bernard Evans, Don Riley, Charles Johnson, Richard Glover, Edgar Oldham, and Mark March. Said representatives of miners were appointed by eleven employees of Pontiki Coal Corporation working at the Pontiki No. 2 mine.

6. From March 1994 to present, Pontiki Coal Corporation has discriminated against the non-employee representatives of miners and the eleven Pontiki Coal Corporation employees who appointed said non-employee miners' representatives. The acts of discrimination are in violation of section 105(c) of the Act [30 U.S.C. 815(c)]. The acts of discrimination engaged in by Pontiki Coal Corporation include but are not limited to the following:

(a) refusal to recognize the non-employees as representatives of miners; (b) posting the appointment notice with the names of the non-employees representatives of miners on the mine bulletin board with the admonishment that Pontiki Coal Corporation would not recognize or honor the appointment of non-employees as miners' representatives; and (c) holding meetings with hourly paid employees, to include the eleven employees described above, and threatening said hourly paid employees with job termination by

In its motion to dismiss, Pontiki argues, inter alia, that under the plain language of section 105(c) the Secretary cannot

bring a complaint on behalf of non-complaining individuals. In this regard, the Respondent also notes that the Commission in *Hatfield versus Colquest Energy, Inc.* 13 FMSHRC 544 (April 1991) that the Commission lacks jurisdiction to hear discrimination complaints which deviate from the allegations of the original complaint filed with the Secretary. Respondent is clearly correct in his arguments. The initiating complaint filed with the Secretary in this case was clearly identified as the complaint of Charles H. Dixon. On the fact of the complaint, he is the only listed named complainant and only Dixon signed the complaint. Under section 105(c)(2) it is only that "miner or applicant for employment or representative of miners" who believes that he has been discriminated against is authorized to file a complaint with the Secretary alleging such discrimination against him. Moreover, the Secretary's findings pursuant to section 105(c)(2) evidenced by its letter to Mr. Dixon dated September 15, 1994 specifically refers to Mr. Dixon's complaint as "your complaint of discrimination" and refers to the findings that "you have been discriminated against". There is, accordingly, no statutory foundation for the Secretary's subsequent expanded and legally unsupported complaint filed with this Commission alleging discrimination not only against the named complainant herein, Charles Dixon, but also as against six other alleged "representatives of miners" and 11 unnamed alleged Pontiki employees who purportedly appointed the non-employee

miners representatives. There being no statutory basis for the addition of these additional complainants in the complaint filed before this Commission I have, therefore, no jurisdictional authority to act on the expanded complaint and it must, accordingly, be dismissed with respect to all additional complainants.

In as much as the discrimination filed with this Commission also contains allegations raising matters and deviating from the original complaint filed by Mr. Dixon with the Secretary on April 26, 1994 those deviating and additional allegations must also be stricken as beyond the scope of this Commission's jurisdiction. *Hatfield versus Colquest Energy, Inc.*, 13 FMSHRC 544 (April 1991).

With respect to the one remaining complainant, i.e. Charles H. Dixon, Pontiki also argues that he was not a person protected under section 105(c) because he was not an applicant, a miner or even a miner's representative when the alleged discrimination occurred. It is undisputed in this case that complainant Dixon did not until April 15, 1994 notify Pontiki of this claim to be a representative of miners at the subject Pontiki mine when Pontiki received by certified mail a "certificate of representation" purportedly under 30 C.F.R. Part 40. It is undisputed that prior to that date Mr. Dixon was not a

miner, applicant for employment, or representative of miners at the subject Pontiki mine. Under the circumstances, I find Pontiki's claim supported in so far as any alleged acts of discrimination preceding April 15, 1994. In examining the specific complaints set forth in Mr. Dixon's April 26, 1994 complaint to the Secretary it is clear, therefore, that this Commission only has jurisdiction over that part of the complaint that claims "management for Pontiki on April 15, 1994 properly received by certified mail pursuant to 30 C.F.C. [sic] Part 40 a certificate of representation of which they have failed to properly recognize." Accordingly, only that issue is properly before me.

Pontiki further argues that Dixon was not a "representative of miners" and is still not a "representative of miners" because of his failure to comply with Part 40 of the Secretary's regulations. In this regard Pontiki notes that 30 C.F.R. section 40.3(a) provides for specific requirement for certification, including both the telephone number both the telephone number of the organization and the telephone number of an individual representative. The regulations specifically provides as follows:

Section 40.3(a) The following information shall be filed by a representative of miners with the appropriate District Manager,

with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

There is no dispute in this case that the UMWA's Washington, D.C. office is not where the listed individual miners' representatives are located -- indeed, three of the listed miners' representatives actually work at Pontiki (Lafferty, Bradley and Manard). Moreover, it is acknowledged that Mr. Dixon's cover letter to the MSHA District Manager is inconsistent with the UMWA designation itself showing a different phone number for him in Pikeville, Kentucky, not Washington, D.C.